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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1939.

No. 28

CITIES SERVICE OIL COMPANY,

Petitioner,

vs.

B. P. DUNLAP, ET AL,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY BRIEF OF RESPONDENTS

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The Court having granted Respondents five days in which to file a reply to the brief filed by petitioner on the day before submission, respondents beg leave to submit to the Court:

Petitioner is before this Honorable Court asking that the case be rendered or remanded to the Circuit Court of Appeals in the one instance because it did not pass

upon the issue with reference to its claim of innocent purchaser and at the same time to ask this Court to send the case back to the Circuit Court of Appeals because the Circuit Court of Appeals did pass upon the issue as to the road and, as it contends, against the weight of authority in Texas.

Respondents admit that if the question as to defense of innocent purchaser is not a matter of pure procedure, that it is not definite from the opinion of the Circuit Court of Appeals that it passed upon the issue of innocent purchaser. Therefore in this reply brief respondents first address themselves to the claimed issue of the Circuit Court's failure to hold that the property was owned by the petitioner under its claim that the property did abut a road.

The trial court found "the four Rogers boys, namely, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with the said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was. The same 66 foot tract was then being used in part as a logging road." (Record, page 63, lines 22 to 27.)

The court further found in its conclusions of law (Record, page 70): "and is most consistent with the construction of the calls by the parties themselves as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to the discovery of oil in East Texas."

Following these findings by the trial court the Circuit Court of Appeals made findings which we will not copy in full here, but the same are set out fully on pages 336-337 of the Record, and then on page 337, at the bottom, used the following language:

> "There is a plainly expressed intention not to add this strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land though to some extent on its far edge it was used as a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed can not have the effect of extending its scope." Citing 11 Corpus Juris, Boundaries, Par. 35.

It is thus clear that the Circuit Court of Appeals passed on the issue as to the strip in question being a road. From the statement made to the Court and some of its questions of counsel in the argument, counsel feels sure that this Honorable Court does not intend and never did intend to pass on the issues of fact for the Circuit Court of Appeals, but to show the correctness of the Circuit Court of Appeals' ruling we ask this Honorable Court to refer to the very case cited by petitioner in its brief, and that is the case of **Rio Bravo Oil Co. v. Weed**, 121 Tex. 427, 50 S. W. (2d) 1080. In that case there was involved not only an accurate description of the land as bordering on a rail-

road by a plat showing four of the tracts of the partition bordering the railroad right-of-way, but the deeds in the partition bordering the railroad right-of-way, but the deeds in the partition referred to the plat and called for it as a description of the lots which were described with reference to the lot numbers of the plat and without field notes. The court held that not only the terms of the deed itself but the subsequent conduct of the parties to the partition revealed unquestionably their intent to partition the whole of the land involved as disclosed from their chain of title alone but here in our case both the trial court and the Circuit Court of Appeals each found that it was the intent of the parties not to include the strip in the partition but to hold and own it jointly. In the partition deeds in the Rio Bravo case the court states and calls attention to the following provision:

> "To have and hold in severalty as his share of said 52 acres,"

and to show that the case is opposite to the instant case in every respect the court goes on to state:

> "To hold that the land included in the right-of-way was intended to be thereafter held in common would not only defeat this purpose, but would bring the terms of the deed into irreconcilable conflict. No extrinsic evidence is required to enable us to gather the intention of the parties to divide the entire fifty-two acres."

The court further says:

> "It is a familiar rule of construction of written instruments where a contract is ambiguous in its terms, a practical and reasonable construction given to it by the parties thereto before any controversy has arisen as to its meaning will generally be given controlling effect by the courts."
>
> * * * * * * * * * *
>
> "It is thus seen that the parties to this particular deed have voluntarily placed in their own chain of title instruments containing the recitation that these former joint owners had in fact divided the entire 52 acres."

The court further uses language that the construction given the deed should harmonize with the terms of the deed, including the scope, subject-matter and purpose thereof, and then on page 1087 says in this behalf:

> "It must be conceded that they were privileged **at their pleasure to make partition of the land on both sides of the railroad right of way, and thus remain tenants in common in the strip over which the right of way was located,** or they could include the fee of the right of way in the partition, subject to the easement owned by the railway company. Sibley v. Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Hill v. Woodward, 100 Miss. 879, 57 So. 294, 39 L. R. A. (N. S.) 538, Ann. Cas. 1914A 390."

Thus the Supreme Court of Texas has held that the parties were privileged at their pleasure to make partition of the 66 foot strip in this case or they were privileged to remain tenants in common in the strip

if they desired. Therefore it was not unlawful for this to be done, as said by the Circuit Court of Appeals. It is clear therefore that the Circuit Court of Appeals did pass upon the issue, just as the trial court passed upon the issue, and having passed upon this issue in accordance with the very case cited by petitioner we feel sure that this Honorable Court must of necessity hold that it will not direct the Circuit Court of Appeals how it shall find the facts or how it shall construe the decisions. If the Circuit Court of Appeals actually passed upon the issue as shown by the opinion, clearly this portion of the application of the petitioner should be refused.

We now for one moment resubmit to the Court as submitted in the argument that question with reference to the point as to innocent purchaser. We frankly state to the Court that we do not know ourselves other than as set out in this short statement whether it should be held that the question of innocent purchaser is one of substance rather than of procedure.

There is no proof in the record that petitioner was a bona fide purchaser for value without notice. It was the opinion of the Circuit Court of Appeals that petitioner being the actor had the burden of proof to show its title. Petitioner was complainant in the trial court. It filed and brought the action in the federal court in equity to remove cloud. (Record 20-28.)

Petitioner asserts that if it had filed this case in the State Courts of Texas the burden would have been placed upon respondents to prove that it was not an innocent purchaser for value without notice, and that under the decision in **Erie R. R. Co. v. Tompkins** the same rule should have been applied in the federal courts.

The crux of this controversy then becomes one as to whether the burden of proof on the question of innocent purchaser is a matter of procedure as stated by the Circuit Court of Appeals or a question of substantive law as contended by petitioner. In his concurring opinion in Erie R. R. Co. v. Tompkins (304 U. S. 64, 92, 58 Sup. Ct. 817, 828) Mr. Justice Reed had this to say on the matter:

> "The line between procedural and substantive law is hazy but no one doubts the federal power over procedure."

Professor Stumberg in his recent work on **Conflict of Laws** has had occasion to make an analysis of these matters:

> "Procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules those which concern the legal effect of those facts after they have been established." Stumberg, Conflicts of Laws (1937), 128.

Ibid, 131:

> "Since proof is directly concerned with the method of presenting to a court the facts upon which,

ultimately the legal relations of the parties depend there could be but little doubt that it relates logically to procedure and not to substance. This is also true of the burden of going forward with the evidence and the question as to who bears the risk of non-persuasion."

Ibid, 135:

"Burden of proof would seem to fall within the procedural field since it relates to the method of presenting the facts to the Court."

On page 46 of its brief petitioner goes so far as to contend that as a matter of substantive law respondents should have further pleaded petitioner was not an innocent purchaser. Pleading has always been a matter of procedure to be determined by the federal equity practice. Again we quote from the text of Professor Stumberg:

"**Rules of practice and pleading are clearly procedural.** Such matters as forms of actions, parties to the suit, and rules of practice and pleading are all customarily treated as procedural."

Petitioner itself so construed the matter for in the trial court it took upon itself the burden of pleading that it was an innocent purchaser.

"Complainant avers that it and its predecessors in title purchased in good faith paying a valuable consideration therefor the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers." (Record 45.)

Its claim of innocent purchaser was in a replication to defendant's answer and cross-action, to deny the facts that had been plead in such answer and cross-action.

The Texas courts themselves have construed their rules about bona fide purchasers not to be rules of substantive law:

> "The doctrine of protection to a bona fide purchaser is not a rule of property, but is merely a rule of inaction. 2 Pomeroy Eq. Jur. (14 ed.) par. 743. It is only available by way of defense and enforces no right and does not determine the question of title between the parties." Neal v. Holt, 69 S. W. (2d) 603 (Tex. Civ. App.—Writ of Error refused)."

Refusal of the writ of error is an approval upon the part of the Supreme Court of Texas of the opinion of the Court of Civil Appeals under the provisions of Art. 1728, Vernon's Ann. Tex. Civ. Stats. (1925) Vol. 3 pocket part: "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined the Supreme Court shall refuse the application."

In the above case the Court of Civil Appeals, after stating that the Shell Petroleum Company had under findings by trial court had "actual notice through abstracts of title," etc., on page 607 of the opinion stated in part:

> The Shell Petroleum Company is not in the position to claim as an innocent purchaser herein because it had both actual and constructive notice

of the contents of the application for sale, etc., each of which appeared in its chain of title. It is charged with notice and knew that there was not attached to the application * * * any written report, etc. * * * *

The Court then says:

"The further and final question arising is whether the Shell Petroleum Corporation is in a position of a bona fide purchaser and can set up such a defense, etc. * * * The most general statement of the doctrine of bona fide purchaser describes the purchase as one made in good faith for a valuable consideration and without notice. The purchaser may pay a valuable consideration, act in good faith and yet he may have notice of matters or circumstances which vitiate the title of the immediate predecessor under whom he claims. It is an elementary doctrine therefore that independently of valuable consideration and good faith, notice will destroy the character of a bona fide purchase and defeat the protection otherwise given to it. * * * The doctrine of protection to bona fide purchaser is not a rule of property, but is merely a rule of inaction. 2 Pom. Eq. Jur. (14 ed.) 743. It is only available by way of defense and enforces no right and does not determine the question of title between the parties. It means that equity will refuse to interfere to aid the plaintiff in his suit because under the circumstances of the case it would be unconscientious for him to have what he is seeking to obtain."

Thus we have the Supreme Court of Texas, by its refusal of a writ of error, stating that the doctrine of

innocent purchaser is not a rule of property as contended for by petitioner. If it is not a rule of property it seems to respondents that the Circuit Court of Appeals was eminently correct in its opinion. Therefore this claim of petitioner should be refused.

There appeared in respondents' brief on page 50 the statement that the petitioner had made a misrepresentation of fact. This was corrected in the transcript submitted to counsel and returned, it is inexcusable that the same now appears in the brief. Counsel apologized to attorneys for petitioner, who would not intentionally misrepresent any fact and who very readily forgave the error. Bad manners, as said by our President the other day need not beget bad manners. However attorneys for petitioners likewise were acrimonious in their reply brief filed on the day before submission. Likewise counsel expressed regret to respondents for the statements therein made and the matter was forgotten. We apologize to this Court for the statements in the brief because however it occurred it was inexcusable.

Respondents therefore respectfully pray the Court that the petition herein be refused and in the alternative, no matter what the Court's action be on the question of innocent purchaser, that the portion of petitioner's prayer with reference to the holding of the Circuit Court of Appeals in regard to the road be in all things refused as the Circuit Court of Appeals undoubtedly passed upon that issue in accordance with the laws and decisions of the State of Texas and with the

facts found by the trial court and the Circuit Court of Appeals.

Respectfully submitted,

Angus G. Wynne

ANGUS G. WYNNE,
Longview, Texas,
Attorney for Respondents.

A copy hereof has been furnished to David B. Trammell, Fort Worth, Texas and Clayton L. Orn, Fort Worth, Texas, Attorneys for petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1939.

Cities Service Oil Company, Petitioner,
vs.
B. P. Dunlap, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

This cause is here in order that we may decide whether the Circuit Court of Appeals wrongly declined to follow the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. We have considered that point only and conclude the ruling below was error. In consequence the challenged judgment must be reversed. The cause will be remanded for final determination upon the entire record consistent with this opinion.

Prior to 1899 Louisa Rogers owned a rectangular tract of land —320 acres—in Gregg County, Texas. In February of that year her heirs—J. F. Rogers and his three brothers—divided this by deeds, duly executed and recorded. One of these conveyed to J. F. Rogers sixty-eight acres out of the northwest portion of the tract, described by metes and bounds. The north line was said to begin at a specified point and to run thence west 440 yards to "Wiley Davis N. E. corner." There the boundary turns south and runs for eight hundred and eighty yards, thence east, &c. Measured on the ground, 440 yards ends sixty-six feet east of Davis' corner. This discrepancy gave occasion for the present controversy over the sixty-six foot strip lying between a south-line from Davis' corner and a parallel one sixty-six feet to the east. The interest asserted by respondents rests upon the theory that by intention this was left undivided.

In 1930 J. F. Rogers' heirs granted an oil and gas lease to all land described in the 1899 deed to him. By assignments and succes-

sion, petitioner Oil Company became owner of this. The conveyances were duly recorded.

In 1934 respondent Dunlap obtained from the three brothers of J. F. Rogers and his heirs, a lease of the major part of the sixty-six foot strip above described. Title to this is the subject of the present controversy.

Claiming that the land described in the Dunlap lease of 1934 was within the boundaries of its earlier one (1930), petitioner filed an original bill in the United States District Court to remove the cloud. Dunlap and the Rogers appeared and denied the material allegations. A cross-bill set up their recorded deed and alleged that the call in the 1899 deed to J. F. Rogers for "Davis' northeast corner" was inserted through inadvertence and mistake; that the distance call controlled; that the purpose of the parties was to establish the western terminus of the north line sixty-six feet east of Davis' corner and leave a strip on the west in common ownership.

Petitioner denied the allegations of the cross-bill and asserted that it and its predecessors were purchasers of the recorded legal title for value in good faith and without notice of mistake.

The District Court ruled in favor of Dunlap. The Circuit Court of Appeals affirmed.

In the latter court petitioner maintained that under the established Texas rule, on an issue of bona fide purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts a superior equity. It cited *White* v. *Hix*, (Texas) 104 S. W. (2d) 136, 139-140,[1] and insisted that *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, required observance of the local rule.

The court recognized the existence of the Texas rule as claimed but thought a different and better one was generally approved and should be followed. It said—

"In the present case the appellant is the original complainant, seeking a decree quieting its title. It has entered a court of equity,

[1] "It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity. Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W. 973; Commonwealth B. & L. Ass'n. v. Howard (Tex. Civ. App.) 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.) 88 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.) 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1037; McAlpine v. Burnett, 23 Tex. 649, 650." And see Ritch v. Jarvis, (Texas) 64 S. W. (2d) 831, 834-835.

asking equity and bound to do equity. The defendants in their answer set up a mistake, correctable in equity, in the partition deed made to complainant's grantor, J. F. Rogers. Complainant replies, denying the alleged mistake and alleging additionally in very general terms that it and its predecessors in title purchased in good faith, paying value for the oil and gas lease it holds in reliance on the deed as written, and without notice or knowledge of the claim now asserted that the call for the Wiley Davis northeast corner was inserted by mistake. There was no further pleading."

"Issue stands joined on the new facts alleged by this complainant's reply concerning its purchase for value without knowledge or notice. It seems to us that the burden of proving these facts ought reasonably to rest on the complainant, both because it has alleged them and they are essential to its success, and because they are peculiarly within its knowledge. . . . What the complainant itself paid, and with what knowledge, it of course knows and could easily prove. There is a failure of evidence, not only as to bona fides and want of notice, but as to what was paid and to whom, and when and how; the details of which the maker of this plea has from the earliest times been held bound to allege and, when put in issue, to prove."

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in Erie R. Co. *v.* Tompkins, and the cases following it."

"We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title.

Central Vermont Ry. v. *White*, 238 U. S. 507, 512, considered an analogous situation and pointed out the principle presently applicable. Proof that petitioner did not purchase for value and in good faith was "part of the very substance" of respondents' cause.

Sundry arguments advanced here to support respondents' demand for affirmance, notwithstanding the erroneous pronouncement below, will be matter for consideration when the cause comes again before the Circuit Court of Appeals.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.